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Ridicule or Recourse: Parents Falsely Accused of Past Sexual Abuse Fight Back

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RIDICULE OR RECOURSE: PARENTS FALSELY ACCUSED OF PAST SEXUAL ABUSE FIGHT BACK

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I. INTRODUCTION

Gary Ramona was falsely accused of sexually molesting his twenty-three year-old daughter, Holly, when she was a child.¹ Unlike many accused of such acts, Gary Ramona fought back. On May 13, 1994, this former winery executive was awarded \$500,000 by a California jury and, even more important, he gained vindication. Holly testified that between the ages of five and eight, her father repeatedly raped her.² She based these accusations solely on memories recovered during recent psychological therapy for bulimia.³ She had not remembered any incidents of childhood sexual abuse until her therapists suggested that her bulimia was caused by past sexual abuse.⁴ Subsequently, her therapist injected her with sodium amytal (truth serum), and while sedated, Holly accused her father of raping her when she was a child.⁵ Her therapists assured her that it was impossible to fabricate stories while under sedation and actively encouraged her to confront her father.⁶

¹Mark Hansen, *More False Memory Suits Likely*, 80 A.B.A. J. 36 (Aug. 1994); *Ramona v. Isabella*, No. 61898 (Cal. App. Super. Ct. May 13, 1994).

²*Id.*

³Elizabeth F. Loftus & Laura A. Rosenwald, *Buried Memories Shattered Lives*, 79 A.B.A. J., 70, 71-72 (Nov. 1993).

⁴*Id.* at 72. After the therapist told Holly's mother that 70 to 80 percent of bulimics have been sexually abused and after attending weekly group meetings, Holly reported having fuzzy flashbacks of sexual abuse by her father. *Id.*

⁵*Id.*

⁶Loftus & Rosenwald, *supra* note 3, at 72.

Mr. Ramona strenuously denied these allegations by his daughter and her therapists. As a result of the allegations, his wife divorced him, his three teen-age daughters refused to speak to him, he was fired from his \$500,000/year job, he lost fifteen pounds, and he was forced to sell the family's \$3 million house.⁷ Mr. Ramona claimed that Holly's therapists had implanted false memories in her mind and therefore were responsible for the injuries to his reputation and his family.⁸ He contended that her therapists "suggested a link between bulimia and sexual abuse and had interpreted [Holly's] fleeting images as memories of incest."⁹ Mr. Ramona sued Holly's therapists for malpractice.¹⁰

Generally, a parent or other third party lacks standing to bring a malpractice claim against a health care provider.¹¹ However, in an unprecedented decision, the trial court permitted a California jury to find that the therapists breached their duty of care to Mr. Ramona when they treated Holly and encouraged her belief in her recovered memories.¹²

This was the first successful malpractice case brought by a third party against a therapist in which the court found the therapist, who supposedly implanted the memories, responsible for the innocent party's monumental losses to his or her reputation, marriage, family life and career.¹³ It was the first time that someone, other than a patient, successfully sued a therapist for the "increasingly controversial technique of recovered memory therapy."¹⁴ Being labeled as a child abuser is "one of the most loathsome labels in society. . . ."¹⁵ Even if the alleged sexual abuser is innocent, he cannot escape the social stigma of the accusation and its emotional and financial repercussions. Allowing suit and money damages does not rectify the problem. Mr. Ramona's loss was much more than \$500,000 even in terms of economics. So, what purpose does allowing suit serve? Although it will not prevent all false claims and will not restore the integrity of the falsely accused, it will deter false implantation and encourage the innocent to fight back.

⁷Katy Butler, *Clashing Memories, Mixed Messages; She Says He Molested Her, He Says He Didn't. There Was a Lot Riding on the Ramona Trial, But in the End, No One Got What They Wanted*, L.A. TIMES, June 26, 1994, at 12.

⁸Loftus & Rosenwald, *supra* note 3, at 72.

⁹Butler, *supra* note 7, at 12.

¹⁰Hansen, *supra* note 1, at 36.

¹¹See *Bird v. W.C.W.*, 868 S.W.2d 767 (Tex. 1994).

¹²*Ramona v. Isabella*, No. 61898 (Cal. Super. Ct. May 13, 1994).

¹³*Ramona* was the first jury award against a therapist in a false memory suit.

¹⁴Hansen, *supra* note 1, at 36.

¹⁵*Rossignol v. Silvermail*, 185 A.D.2d 497 (N.Y. App. Div. 1992).

In most circumstances, psychotherapy is an invaluable tool in the treatment of many mental disorders.¹⁶ As the public began to realize the frequency of child sexual abuse, there was an increase in the reliance on recovered memory techniques to uncover memories of past sexual abuse.¹⁷ In repressed memory cases, the use of psychotherapy and its techniques has brought about a new controversy regarding its reliability. "Researchers and therapists view the question of repressed memories from disparate vantage points, and with strong disagreements about the phenomena."¹⁸ "[S]cience has simply not evolved to the point that it can give definite guidance in determining whether childhood sexual abuse has occurred in a particular instance."¹⁹

Mental health professionals are divided on both sides of this controversy. One side argues that false memories occur frequently and that people are remembering what their therapists suggest to them. The other side argues that people cannot be made to recall sexual abuse that did not happen. Professor Elizabeth F. Loftus of the University of Washington contends that many of the reported cases of repression were the result of well intentioned but misdirected counselors planting the necessary seed in the minds of their patients.²⁰ Professor Loftus does not doubt the reality of all child abuse, but does doubt the memories that emerge in adulthood after extensive memory work.²¹ She describes "memory work" as "therapeutic hypnosis or age regression or suggestive questioning or guided visualization or sexualized dream interpretation. . . ." ²² Professor Loftus claims "there's little science to support the idea that trauma that is regressed can return decades later in pristine form."²³ The key figure on the other side of this debate is Dr. Lenore Terr, a San

¹⁶Psychotherapy, as used in this Note, applies to any form of psychoanalytic therapy, whether conducted by a psychiatrist, psychologist, or otherwise designated therapist.

¹⁷RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY AND SEXUAL HYSTERIA 3 (1994). Richard Ofshe predicts that "[r]ecovered-memory therapy will come to be recognized as the quackery of the 20th century. . . ." Leon Jaroff & Jeanne McDowel, *Lies of the Mind*, TIME, Nov. 29, 1993, at 52.

¹⁸S.V. v. R.V., 933 S.W.2d 1, 15 (Tex. 1996).

¹⁹*Id.*

²⁰Deborah Peterson, *Recalling Childhood Sexual Abuse is Like Re-collecting Pieces of a Broken Vase*, HARTFORD COURANT, Sept. 17, 1992, at E1. "Repression refers to the active banishment into the unconscious of a traumatic event or series of traumas." ELIZABETH LOFTUS & KATHERINE KETCHAM, THE MYTH OF REPRESSED MEMORY 141 (1994).

²¹Elizabeth Loftus, *You Must Remember This ... Or Do You? How Real are Repressed Memories*, WASH. POST, June 27, 1993, at C1.

²²*Id.*

²³*Id.* Loftus refers to a study by research psychologist David Holmes of the University of Kansas. Holmes reviewed 60 years of research and found no controlling studies showing that an event can be accurately reproduced in memory after a long period of regression. *Id.*

Francisco psychiatrist and researcher who has worked for thirty years with battered and traumatized children.²⁴ According to Dr. Terr:

[C]hildren who survive repeated and secret abuse often learn to put themselves in trance states during the rapes or the beatings. Afterward, they tell no one, not even themselves, what has happened, and some of their memories may never get transferred to the part of the brain where stories dwell.²⁵

In addition, Paul McHugh, chairman of the psychiatry department at Johns Hopkins University, says the issue of repressed memories "is the biggest story in psychiatry in a decade. It is a disaster for orthodox psychotherapists who are doing good work."²⁶ Professors Terr and Loftus' strong views on the subject have made them the most sought after witnesses in civil suits for damages resulting from childhood sexual abuse and more recently, as witnesses in civil suits against psychiatrists and other therapists accused of implanting false memories.

Even though repressed memories in many cases may be true, the use of controversial and/or suggestive techniques increases the possibility of false accusations and memories. A nineteenth-century psychologist warned of the dangers inherent in the techniques used to recall partial memories: "Total forgetfulness is not serious; but partial forgetfulness is treacherous. . . . We are liable to fill in from our imagination and disjointed fragments furnished by memory. . . . We unwittingly become creative artists."²⁷

The increased frequency of false memory claims has sparked the development of various victim support groups and foundations. The False Memory Syndrome Foundation, an advocacy organization founded by accused parents three years ago, has heard from more than 13,000 people who claim to be victims of false accusations of sexual abuse.²⁸ Since its commencement, it has also heard from about 300 retractors, those who have recovered memories believed to be true only to later retract them as false and unreliable.²⁹ Between sixty and seventy percent of these retractors had initiated a lawsuit against their alleged abusers.³⁰

²⁴LENORE TERR, UNCHAINED MEMORIES: TRUE STORIES OF TRAUMATIC MEMORIES, LOST AND FOUND (1994)

²⁵Butler, *supra* note 7, at 12.

²⁶Jaroff & McDowel, *supra* note 17, at 52.

²⁷S.V. v. R.V., 933 S.W.2d 1, 17 (quoting P. Jessen, EINER WISSENSCHAFTLICHEN BEGRÜNDUNG DER PSYCHOLOGIE (1855)).

²⁸Holly Metz, *Fact or Fantasy? The Debate Over "Repressed Memory Syndrome" Enters the Courtroom*, STUDENT LAWYER, Dec. 1995, at 22-23.

²⁹*Id.*

³⁰*Id.* at 22.

The term "false memory syndrome," coined by the foundation,³¹ is "a condition in which a person's identity and relationships are centered around the memory of a traumatic experience which is objectively false but the person strongly believes it to be true."³² Since the foundation began publicizing its belief that delayed memories of sexual abuse and incest were "too often a result of false memories caused by a disastrous 'therapeutic' program," the American Psychological Association, the American Medical Association and the American Psychiatric Association followed with statements of their uncertainty as to the validity of these recovered memories.³³ In 1993, the American Medical Association (AMA) warned against the use of nontraditional techniques to validate repressed memories.³⁴ Then in 1994, the AMA further stated that absent corroborating evidence, no completely accurate way of determining the validity of reports based on recovered memories exists.³⁵ In most false memory situations, the therapists fail to support their diagnosis with any such corroborating evidence. "Only a series of clinical studies on adult memories of confirmed incidents of childhood abuse will resolve the false-memory controversy."³⁶

The term "false memory" is defined as "a strongly imagined memory, a totally distorted memory, a lie, or a misconstrued impression."³⁷ "False memory" has also been used to describe the allegations in lawsuits by former patients and their parents against psychotherapists who utilize controversial and/or suggestive techniques that, critics claim, permit the therapist to implant false memories of childhood sexual and physical abuse in the patient's mind.³⁸

³¹*Id.*

³²Metz, *supra* note 28, at 22.

³³*Id.*

³⁴Loftus & Rosenwald, *supra* note 3, at 71-72.

³⁵*Id.*

³⁶TERR, *supra* note 24, at 165.

³⁷*d.* at 159.

³⁸Tuman v. Genesis Assocs., 894 F. Supp. 183, 185 n.1 (E.D. Pa. 1995). This note was written prior to the rehearing of Tuman on April 25, 1996 and therefore will not be considered herein. Upon rehearing, the court denied the therapists motion for summary judgment with respect to negligence, breach of contract and intentional misrepresentation. Tuman v. Genesis Assocs., 935 F. Supp. 1375, 1394 (E.D. Pa. 1996). The court entered judgment in favor of the therapists on the intentional infliction of emotional distress claims because the plaintiffs failed to "offer expert medical confirmation that they actually suffered the claimed distress" as is required in Pennsylvania. *Id.* at 1393. The court also entered judgment in favor of the therapists on the defamation claim due to plaintiffs' failure to prove special damages or slander per se. *Id.* at 1392-93. Under Pennsylvania law, a plaintiff may recover for defamation absent a showing of special damages where the statements constitute slander per se. *Id.* at 1392 (citing Walker v. Grand Central Sanitation, Inc., 634 A.2d 237, 242 (Pa. Super. Ct. 1993)). Statements that constitute slander per se include words imputing a criminal offense,

Claims of implanted ritual abuse, "baby breeding and animal sacrifice, robes and distant places" have been common in these cases.³⁹ Other claims have included being forced to consume a human penis or the flesh of a newborn infant.⁴⁰ Another patient claimed that she had wires inserted into her ankles "rendering her incapable of wearing 'any other shoes but Birkenstocks.'"⁴¹ Still other patients have been "induced to believe they had children when they were 8 years old, things that are physiologically impossible."⁴² There exists little scientific evidence to support the theory that complete repression of memory can occur.⁴³

In addition, self-help books can have the same suggestive effect.⁴⁴ The most controversial and best-selling of these self-help books is "The Courage to Heal" by Ellen Bass and Laura Davis which is often considered to be the bible of the recovered-memory movement.⁴⁵ "The Courage to Heal" advises therapists to recognize the symptoms of early sexual abuse: "If sexual abuse isn't the presenting problem but your client has eating disorders, an addiction to drugs or alcohol, suicidal feelings, or sexual problems, these may be symptoms of sexual abuse."⁴⁶ The symptoms listed in "The Courage to Heal" includes powerlessness, feeling different, inability to express feelings, depression, substance abuse, eating disorders, and loneliness.⁴⁷ The book further states: "Even if you are unable to remember any specific instances but still have a feeling that something happened to you, it probably did."⁴⁸ "If you think you were abused and your life shows the symptoms, then you were."⁴⁹ Many of these self-help authors, like Bass and Davis, have no academic training in psychology, yet many therapists encourage patients to read "The Courage to

loathsome disease, business misconduct and serious sexual misconduct. *Id.* (citing *Chicarella v. Passant*, 494 A.2d 1109, 1115 n.5 (Pa. Super. 1985).

³⁹Metz, *supra* note 28, at 27.

⁴⁰Joseph T. Hallinan, *Repressed Memory Equals False Memory, Critics Say*, LAS VEGAS REV.-J., Dec. 15, 1996.

⁴¹*Id.*

⁴²Metz, *supra* note 28, at 27.

⁴³Tracy Thompson, *Delayed Lawsuits of Sexual Abuse on the Rise*, WASH. POST, Aug. 14, 1991, at B1. David Holmes published a study in which he concluded that no reliable evidence for regression exists. He noted that despite over sixty years of research involving numerous approaches by many investigators, no controlled laboratory evidence supports the concept of complete regression. *Id.*

⁴⁴Jaroff & McDowel, *supra* note 17, at 52.

⁴⁵*Id.*

⁴⁶ELLEN BASS & LAURA DAVIS, *THE COURAGE TO HEAL* 349 (1988).

⁴⁷MARK PENDERGRAST, *VICTIMS OF MEMORY* 63 (1995).

⁴⁸*Id.* at 52.

⁴⁹*Id.* at 51.

Heal" and other similar books as part of their therapy.⁵⁰ Several of these books also contain lists of symptoms to be considered in diagnosing repressed memory victims.⁵¹ The books tell readers that even though they have no recollection of any specific sexual or physical abuse, they may be victims of such abuse if they experience conditions such as depression, anxiety, loss of appetite or eating disorders, sexual problems and difficulty with intimacy.⁵² It is evident that numerous persons in the United States and internationally have experienced at least one of these conditions at one time or another during their lifetimes. This list of symptoms "is general enough to include everybody at least sometimes. Nobody doesn't fit it."⁵³ If we were to follow these symptoms, only in a rare case would any individual have escaped childhood without having been a victim of sexual abuse. Accordingly, the number of potential sexual abuse claims is virtually unlimited. According to these books, anyone who somehow "thinks" he or she was abused and who suffers from any one of these relatively common symptoms is justified in making such a claim. The fact that such claims may have no factual foundation is irrelevant.

The *Ramona* case was only the start of what has become a widespread phenomenon of false memory suits brought by accused parents. This case raised the issue of whether future wrongly accused parents can recover for personal and financial loss from psychotherapists who place false memories of past sexual abuse in the minds of their children. The verdict "demonstrates that juries are willing to listen to the evidence and come to the conclusion that therapists should be held accountable for engaging in risky and dangerous practices."⁵⁴

This Note argues that wrongly accused parents should be granted standing by the courts to bring suit against therapists who negligently suggest that their children are victims of sexual abuse. The first section will analyze the validity of recovered memories obtained through the use of various suggestive techniques. The second section will explore the various causes of action that courts are considering actionable by innocent third parties against the therapists who implant false memories. The causes of action that will be analyzed are malpractice, negligence, intentional infliction of emotional distress, defamation, loss of companionship and society, and breach of contract. Cases involving false memories are a very new and controversial problem in our courts today and these causes of action are only the beginning of the cure.

⁵⁰*Id.*

⁵¹Other lists of symptoms include the fear of being alone in the dark, nightmares, poor body image, headaches, arthritis, adult nervousness, fear of losing control, guilt, shame, low self-esteem, feeling crazy, feeling different, and denial or no awareness at all. E. SUE BLUME, *SECRET SURVIVORS: UNCOVERING INCEST AND ITS AFTEREFFECTS IN WOMEN* (1991).

⁵²Loftus & Rosenwald, *supra* note 3, at 70.

⁵³LOFTUS & KETCHAM, *supra* note 20, at 154-55.

⁵⁴Loftus & Rosenwald, *supra* note 3, at 70.

II. PSYCHOTHERAPY: CAN THESE MEMORIES BE TRUSTED?

Psychotherapy is used around the world as treatment for a number of mental and health disorders. In a therapy session, the patient's perception of herself and her family, a failure of the therapist to consider scientific memory evidence and a predisposition to find repression and sexual abuse, may combine with the emotional patient-therapist relationship to create false memories. Memories that surface during therapy are particularly vulnerable to charges of unreliability "because psychotherapy is a healing technique and not a search for truth."⁵⁵ In many situations, the discovery of true repressed memories has proven to be invaluable to the therapy of victims of past sexual abuse. But in many other situations, the implantation of false memories has caused severe damage to the patient and his or her family. An examination of the techniques used to reconstruct repressed memories supports the argument that the origin of these memories is often times not in the patient's mind, but in the therapist's mind.⁵⁶

Many suggestive techniques used by therapists to reconstruct repressed memories are now being questioned and closely scrutinized by the legal and medical communities. The American Psychiatric Association clarified the therapist's role in repressed memory cases by stating:

Psychiatrists should maintain an empathic, non-judgmental, neutral stance towards reported memories of sexual abuse. . . . Care must be taken to avoid prejudging the cause of the patient's difficulties, or the veracity of the patient's reports. A strong prior belief by the psychiatrist that sexual abuse, or other factors, are or are not the cause of the patient's problems is likely to interfere with appropriate assessment and treatment.⁵⁷

Psychotherapy patients seek therapy for a wide variety of common problems including sexual problems, depression, anxiety, loss of appetite and eating disorders. Because a therapist may bring into the therapeutic relationship their own assumptions, biases, and expectations, he or she may suggest causes for the patient's problems that do not exist.⁵⁸ In a false memory situation, the therapist, faced with a patient without an apparent source for his or her problems, may be inclined to conclude that the patient must be suffering as a result of repressed sexual abuse. When entering therapy, a patient is usually in

⁵⁵*Id.* at 71.

⁵⁶Georgia Sargeant, *Victims, Courts, Academics Debate Truth of Recovered Memories in Abuse Cases*, TRIAL, May 1994, at 12. The most common techniques for recovering repressed memories are hypnosis, group therapy, dream interpretation, massage and sodium amytal therapy. *Id.*

⁵⁷American Psychiatric Association, *Statement on Memories of Sexual Abuse*, INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 261, 263 (1994).

⁵⁸LOFTUS & KETCHAM, *supra* note 20, at 266.

a vulnerable, distressed frame of mind.⁵⁹ Troubled patients may willingly accept the theory of past sexual abuse because it offers an immediate explanation for his or her problems. It cannot be said that these symptoms can never arise from sexual abuse, but, too many therapists, too often, are too anxious to make the jump rather than look at the alternative causes of the presenting problem.⁶⁰

"Impatient analysts" who are "too eager to confirm [their] theories, may easily see their wish granted; under the pressure of leading questions, the memory all too easily assumes the form which [the therapists] are expecting."⁶¹ For example, many therapists believe that a majority of those suffering from bulimia were sexually abused.⁶² However, scientific research shows that the frequency of sexual abuse among bulimics is approximately the same, if not less, than that of the general population.⁶³ Studies have concluded that childhood sexual abuse was "neither necessary nor sufficient for the later development of an eating disorder."⁶⁴

The goal of therapy is to clarify and explain the patient's symptoms and allow the patient to achieve closure with his or her past.⁶⁵ Many therapists, when faced with patients who refuse to admit to abusive childhoods, "may tell them that they are in denial, may encourage the clients to tell stories or imagine hypothetical incest scenes, or may interpret dream symbols as signs of sexual abuse."⁶⁶ Because the patient is dependent on the therapist, such therapist has the opportunity to place enormous influence on the patient.⁶⁷ Instead of recovering repressed memories, the therapist expresses his or her own

⁵⁹PENDERGRAST, *supra* note 47, at 511.

⁶⁰Holly Ramona's therapist believed that 70 - 80% of bulimics had been sexually abused as children. Jennifer Warren, *Trial Focuses on Validity of Recovered Memories Psychiatry: A Man's Malpractice Suit Against His Daughter's Therapists Says They Created Her Visions of Incest*, L.A. TIMES, Apr. 6, 1994, at A1.

⁶¹DONALD P. SPENCE, *NARRATIVE TRUTH AND HISTORICAL TRUTH: MEANING AND INTERPRETATION IN PSYCHOANALYSIS* 28 (1982).

⁶²Julie M. Kosmond Murray, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 505 (citing OFSHE & WATTERS, *supra* note 17, at 71-74).

⁶³*Id.* (citing Harrison G. Pope, Jr. & James I. Hudson, *Is Childhood Sexual Abuse a Risk Factor For Bulimia Nervosa?* 149 AM. J. PSYCHIATRY 455 (1992)).

⁶⁴Johann Kinzel et al., *Family Background and Sexual Abuse Associated with Eating Disorders*, 151 AM. J. PSYCHIATRY 1127, 1130 (1994). One study included 202 women and found that the development of an eating disorder was not linked to childhood sexual abuse. *Id.*

⁶⁵*Sullivan v. Cheshier*, 846 F. Supp. 654, 657 (N.D. Ill. 1994) (quoting therapist's statement concerning the goals of therapy).

⁶⁶Murray, *supra* note 62, at 513. (citing Elizabeth F. Loftus, *The Reality of Repressed Memories*, 48 AM. PSYCHOLOGIST 518, 527 (1993)).

⁶⁷PENDERGRAST, *supra* note 47, at 511.

conclusions about the origin of the patient's problems through repeated suggestive questioning.⁶⁸ Likewise, the patient reacts to the therapist's stated conclusions and often feels the need to please the therapist by being a good patient and giving the therapist useful material.⁶⁹ After identifying symptoms as signs of prior sexual abuse, the therapist employs several of techniques to uncover repressed memories. These controversial suggestive techniques include hypnosis, certain forms of group therapy, dream interpretation, massage and sodium amytal therapy.⁷⁰

Hypnosis may be the most controversial technique used by therapists and the validity of statements made by a hypnotized patient has been questioned since the technique began.⁷¹ Hypnosis is "a temporary condition of altered attention in the subject."⁷² Experts in the medical field agree that repressed memories retrieved under hypnosis are often mixtures of fantasy and truth.⁷³ In 1958, the AMA warned of the risks associated with hypnosis, specifically the risk of alternating consciousness and memory, and increasing susceptibility to suggestion.⁷⁴ Later in 1985, the AMA supported its 1958 statement by stating, "at best hypnosis may aid in the production of memories, but these memories will not necessarily be accurate."⁷⁵ Furthermore, the "Comprehensive Textbook of Psychiatry" stated that "the hypnotized individual has a pronounced tendency to confabulate in those areas where there is little or no recollection . . . and . . . there is a high likelihood that the beliefs of the hypnotist will somehow be communicated to the patient in hypnosis"⁷⁶ More than half of the states already exclude hypnotically restored and reinforced testimony, noting questions about its accuracy.⁷⁷ The courts of these states have found that such testimony is "either inherently unreliable or at least that its reliability has little

⁶⁸LOFTUS & KETCHAM, *supra* note 20, at 25.

⁶⁹ALAN W. SCHEFLIN & JERROLD L. SHAPIRO, *TRANCE ON TRIAL* 6, 96 (1989).

⁷⁰Sargeant, *supra* note 56, at 12.

⁷¹See ROBERT A. BAKER, *THEY CALL IT HYPNOSIS* 53-87 (1990). A majority of courts hold that testimony recalled for the first time under hypnosis to be "per se inadmissible" at trial. Murray, *supra* note 62, at 519 (citing Contreras v. State, 718 P.2d 129, 139-40 (Alaska 1986); Collins v. Superior Ct. of County of Maricopa, 644 P.2d 1266, 1293-94 (Ariz. 1982); Peterson v. State, 448 N.E.2d 673, 676-77 (Ind. 1983); State v. Collins, 464 A.2d 1028, 1044 (Md. 1983); State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980)).

⁷²John L. Plotkin, *The Previously Hypnotized Witness: Is His Testimony Admissible?*, 106 MIL. L. REV. 163, 170 (1984)(quoting Council on Mental Health, *Medical Use of Hypnosis*, 168 JAMA 186 (1958)).

⁷³PENDERGRAST, *supra* note 47, at 126.

⁷⁴SCHEFLIN & SHAPIRO, *supra* note 69, at 108-09.

⁷⁵*Id.*

⁷⁶PENDERGRAST, *supra* note 47, at 126. (quoting COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1516 (Harold I. Kaplan ed., 5th ed. 1989)).

⁷⁷Metz, *supra* note 28, at 27.

support from the relevant scientific community."⁷⁸ Several characteristics of an hypnotic state have been identified as possible reasons for the creation of false memories, including: "an increased state of suggestibility . . . ; a possible desire to please the hypnotist . . . ; the possibility that the subject will fill in gaps in his actual recollection with fantasy . . . ; and the subject's heightened certitude about the accuracy of his recollections."⁷⁹ Thus, a previously hypnotized patient may abandon his or her critical judgment about the memory and in fact believe that the memory discovered by hypnosis actually occurred.⁸⁰

Group therapy, another commonly used technique in memory therapy, presents inherent problems because of the patient's tendency to follow the crowd.⁸¹ The power of a group of peers along with this tendency to "follow the crowd" may be enough to convince a nonbeliever to believe in the validity of his or her memories. Such pressures can then lead to inaccurate recollections and subsequently result in false accusations. The group sessions continuously encourage patients to let go of their denial as part of the group healing process. Group therapists may even warn patients that "outsiders" (i.e., family members) will doubt the memories, thus creating a place of comfort and acceptance in the group.⁸² All of these influences and pressures are powerfully suggestive, and can combine to create inaccurate or even false memories.

Other equally suggestive therapy techniques used by memory therapists include age regression, guided imagery, visualization, massage, dream interpretation, and sodium amytal therapy.⁸³ These techniques are used to relax the patient leading to greater influence and suggestion by the therapist. In fact, many of these therapy techniques are siblings of hypnosis.⁸⁴ Accordingly, these techniques inherently contain the same questions regarding their validity as hypnosis. The American Medical Association has cautioned that sodium amytal "has no legitimate use in recovered memory cases."⁸⁵ "The danger in all of these techniques is that the therapist validates the 'memories' by encouraging their creation and rewarding the patient with positive feedback when she 'remembers' anything."⁸⁶

⁷⁸Garry M. Ernsdorff & Elizabeth F. Loftus, *Let Sleeping Lie? Words of Caution About Tolling the Statute of Limitations in Cases of Memory Repression*, 84 J. CRIM. L. & CRIMINOLOGY 129, 162 n.169 (1993).

⁷⁹Plotkin, *supra* note 72, at 173.

⁸⁰*Id.* at 173-74.

⁸¹OPSHE & WATTERS, *supra* note 17, at 116.

⁸²BASS & DAVIS, *supra* note 46, at 87.

⁸³Sargeant, *supra* note 56, at 12.

⁸⁴SCHEFLIN & SHAPIRO, *supra* note 69, at 6.

⁸⁵American Medical Association, Report of the Council on Scientific Affairs, CSA Report 5-A-94, at 2.

⁸⁶Shiela F. Rock, *A Claim for Third Party Standing in Malpractice Cases Involving Repressed Memory Syndrome*, 37 WM. & MARY L. REV. 337, 351. (citing LOFTUS & KETCHAM,

As time goes by and research into these techniques and the issue of false memories evolve, we must be careful to question the validity of these memories recovered by these controversial and suggestive techniques. Using these techniques, the therapist, ignoring even the patient's own denial of abuse, may implant the memories through repeated suggestions and questions. As *Ramona* first established, therapists who use controversial or suggestive techniques and negligently conclude that a patient has been sexually abused as a child may be held responsible for the damage suffered by the falsely accused parents. Only by recognizing the validity of this decision will we begin to protect those who are falsely accused.

III. THIRD PARTY CAUSES OF ACTION AGAINST PSYCHOTHERAPISTS

Due to the alarming increase in cases involving recovered memories, an increase in the potential liability of therapists is almost certain. The disastrous emotional and financial repercussions of false memory allegations necessitate that standing be granted to those falsely accused. Innocent parents, like Mr. Ramona, cannot be expected to tolerate and be forced to live with the stigma of being an accused child molester without legal recourse. As a result of Mr. Ramona's success, falsely accused parents may be more successful in seeking third party standing to file action against the negligent therapists. Since *Ramona*, courts are opening the door for third party actions by parents against psychotherapists in false memory situations.

In the summer of 1995 in *Tuman v. Genesis Assocs.*, the United States District Court for the Eastern District of Pennsylvania faced seven different causes of action against two psychotherapists who allegedly implanted false memories into the mind of the plaintiffs' daughter.⁸⁷ In *Tuman*, Diane, who was twenty-one years old, became a client of her therapists for treatment of bulimia.⁸⁸ The treatment recommended by her therapists required that her parents separate and detach from Diane for approximately two years.⁸⁹ Her parents agreed to the separation, agreed to pay for the treatment, and specifically instructed the therapists to treat Diane, meanwhile her therapists agreed to provide Diane with psychological counseling and mental health therapy within acceptable standards of care.⁹⁰

Diane's parents alleged that the therapists provided Diane with substandard care and that they brainwashed Diane by implanting false memories that (1) her parents were members of a satanic cult; (2) her parents murdered Diane's twin brother and other children during satanic rituals; (3) Diane's father raped and impregnated her; (4) her parents murdered a child conceived by Diane and

supra note 20, at 24).

⁸⁷*Tuman v. Genesis Assocs.*, 894 F. Supp. 183 (E.D. Pa. 1995).

⁸⁸*Id.* at 185.

⁸⁹*Id.*

⁹⁰*Id.*

her father during a satanic ritual; and (5) cult members intended to harm Diane for attempting to leave the cult.⁹¹ Diane's parents further alleged that on numerous occasions during group therapy sessions, her therapists stated that Diane was a victim of incest and ritual satanic abuse, and then invited Diane to disclose to the group members the identity of her abusers.⁹² With this encouragement from her therapists, Diane falsely stated that her parents committed incest and murder, and led a satanic cult.⁹³ The therapists subsequently solicited money to help Diane hide from the cult, she assumed a new identity and her parents have not seen or heard from her in more than two years.⁹⁴

Diane's parents brought suit against the therapists based on contract and tort theories of liability.⁹⁵ In response to the therapist's motion to dismiss for failure to state a claim, the court refused to dismiss the claims of breach of contract, intentional infliction of emotional distress, defamation and intentional misrepresentation as viable claims for relief.⁹⁶

Tuman is just the most recent example of how courts are now looking at accusations of sexual abuse resulting from questionable psychotherapy. The decision in *Tuman* has supported the decision of other courts in finding potential liability on the part of negligent therapists under numerous different causes of action.

A. Malpractice And Negligence

The tort of malpractice is most commonly defined as professional negligence.⁹⁷ The traditional formula for the elements necessary to state a cause of action for negligence are: (1) a duty owed, recognized by law, requiring the person to conform to a certain standard of care for the protection of others against unreasonable harm; (2) a failure of that person to conform to the standard required or breach of that duty; (3) a causal connection between the

⁹¹894 F. Supp. at 185.

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.* at 185-86.

⁹⁵894 F. Supp. at 185. Diane's parents asserted the following claims: breach of contract, negligence, interference with filial relations, intentional infliction of emotional distress, intentional misrepresentation and defamation. *Id.*

⁹⁶*Id.* at 191. Plaintiffs' claims for negligence and interference with filial relations were dismissed by the court. Plaintiffs' negligence claim was dismissed because they failed to plead physical injury as required by Pennsylvania law. *Id.* at 189. Plaintiffs' claim for interference with filial relations was dismissed because Pennsylvania courts "have consistently refused to recognize a parent's direct cause of action for loss of filial consortium caused by the interference of a third party." 894 F. Supp. at 189-90.

⁹⁷RESTATEMENT (SECOND) OF TORTS § 299A (1986).

conduct and the resulting harm; and (4) actual loss or damage resulting to the interests of another.⁹⁸

In medical malpractice cases, the reasonable prudent person standard of negligence is abandoned and the doctor is held instead to the standard of the medical profession. Thus, regardless of the result, there is no negligence if the conduct complained of was acceptable to medical professionals as good or customary practice.⁹⁹ If the doctor or health care provider has knowledge, skill or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with that superiority.¹⁰⁰ Professional persons, such as psychotherapists, and those who undertake any work calling for special skill, are required to possess a minimum standard of special knowledge and ability.¹⁰¹ A doctor or other health care provider "must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing,"¹⁰² and the provider will be liable if harm results because he failed to provide that standard of care. The physician is therefore required not only apply that special skill and knowledge as he in fact has, but is also expected to meet a minimum professional standard.¹⁰³ In a medical malpractice case, the plaintiff must prove the establishment of a "relationship in which the clinician undertook [an obligation or duty] to treat him in a nonnegligent way."¹⁰⁴

In the typical false memory situation, the third party has difficulty establishing standing to sue due to the failure to show a legal duty of care to the third party arising out of the therapist's treatment of the patient.¹⁰⁵ Traditionally, only a patient could sue a physician or therapist based on an injury caused by their negligent acts. Courts generally hold that a third party lacks standing in a malpractice claim because a health care provider has no duty of care to the third party. For example, in *Bird v. W.C.W.*, the Supreme Court of Texas held that as a matter of law a psychotherapist owed no professional duty to a parent third party to not negligently misdiagnosis the condition of a patient child.¹⁰⁶ In *Bird*, a psychologist, Esther Bird, examined a

⁹⁸W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 164-65 (5th ed. 1984).

⁹⁹See Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 605 (1959).

¹⁰⁰KEETON, *supra* note 98, at 185.

¹⁰¹*Id.*

¹⁰²*Id.* at 187.

¹⁰³DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 310 (1985).

¹⁰⁴PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 141-43 (2d. ed. 1991).

¹⁰⁵Hansen, *supra* note 1, at 37.

¹⁰⁶*Bird v. W.C.W.*, 868 S.W.2d 767, 768 (Tex. 1994).

child for signs of sexual abuse. Bird concluded that the child had been sexually abused by the child's natural father, W.C.W.¹⁰⁷ The psychologist then signed an affidavit reporting these allegations.¹⁰⁸ This affidavit was filed in the family court in an effort to terminate W.C.W.'s child custody and visitation rights.¹⁰⁹ The police department also filed criminal charges against W.C.W.¹¹⁰ After all criminal and civil sexual abuse charges were dropped, W.C.W. sued Bird for malpractice.

The Court looked to a balancing test for its determination of whether a duty to the father should be imposed on the therapist not to negligently misdiagnose the condition of the child. "In determining whether to impose a duty, this Court must consider the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the actor."¹¹¹ The court acknowledged that the harm to a parent accused of sexual abuse is foreseeable, but "foreseeability alone is not a sufficient basis for creating a new duty."¹¹² The court reasoned that while psychotherapists may be able to conduct tests to determine whether sexual abuse has in fact occurred, the quality of the information that they receive is limited.¹¹³ Since a child is often the main source of this information, its validity may be suspect due to a young child's difficulty in communicating abuse of that nature.¹¹⁴ The court concluded that the risk of injury to an accused parent is only one factor in determining a duty.¹¹⁵ In finding no duty, the court held that "[b]ecause they are dealing with such a sensitive situation, mental health [care] professionals should be allowed to exercise their professional judgment in diagnosing sexual abuse of a child without the judicial imposition of a countervailing duty to third parties."¹¹⁶ "[T]here is great social utility in encouraging mental health

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰868 S.W.2d at 768.

¹¹¹*Id.* at 769 (citing *Greater Houston Transp. Co., v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)).

¹¹²*Id.* (citing *Boyles v. Kerr*, 855 S.W.2d 593, 599 (Tex. 1993); *Graff v. Beard*, 858 S.W.2d 918 (Tex. 1993)).

¹¹³868 S.W.2d at 769.

¹¹⁴*Id.*

¹¹⁵*Id.*

¹¹⁶*Id.* The court acknowledged two prior cases which found no duty in similar situations. In *Vineyard v. Kraft*, 828 S.W.2d 248 (Tex. App. 1992), a father accused of sexually molesting his daughter sued the doctor and the psychotherapist for negligent misdiagnosis and for negligent infliction of emotional harm. The court declined to find a legal duty because there was no physician-patient relationship. In *Dominguez v. Kelly*, 786 S.W.2d 749 (Tex. App. 1990), a father was charged with aggravated sexual abuse

professionals to assist in the examination and diagnosis of sexual abuse."¹¹⁷ The court found that the social utility of diagnosing sexual abuse outweighed the risk of injury to the wrongly accused parent.¹¹⁸

Other courts, however, have found an affirmative duty from a health care provider to a parent or third party. The precedent for a duty owed to third parties started with *Tarasoff v. Regents of the Univ. of Cal.*¹¹⁹ In *Tarasoff*, the Supreme Court of California held that a clinician has a duty to take reasonable measures to protect a third party when he or she knows the patient presents a danger to that party.¹²⁰ The court listed a group of factors it considered in reaching its decision to expand a therapist's liability to third parties including:

the foreseeability of the harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.¹²¹

The court considered the foreseeability factor to be the most important even though it looked at all of these factors in making its decision.¹²² The precedent following the decision in *Tarasoff* is that courts have found that a therapist has a duty to prevent foreseeable injury to a foreseeable third party.

It is foreseeable that harm to a parent may result from negligent false accusations of child abuse by a psychotherapist.¹²³ Injury is almost certain to result when a parent is falsely accused of sexually abusing a child.¹²⁴ To begin the process of healing, patients are often urged by their therapists to confront their parents.¹²⁵ This is considered a critical step in the therapy.¹²⁶

after a doctor concluded that his daughter had been sexually abused. After the charges were dropped, the father filed suit against the doctor for negligence. The court held that because there was no physician-patient relationship, there was no duty. *Id.*

¹¹⁷*Bird*, 868 S.W.2d. at 770.

¹¹⁸*Id.*

¹¹⁹*Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976).

¹²⁰*Id.*

¹²¹*Id.* at 342.

¹²²*Id.*

¹²³*Montoya v. Bebensee*, 761 P.2d 285 (Colo. Ct. App. 1988).

¹²⁴868 S.W.2d at 769.

¹²⁵LOFTUS & KETCHAM, *supra* note 20, at 518, 522.

¹²⁶*Id.*

In *James W. v. Superior Court*, the California Court of Appeals found a therapist liable for malpractice for encouraging his patient, an eight-year-old girl, to accuse her father of sexual abuse.¹²⁷ In *James W.*, a hospital staff determined that plaintiff's daughter, Alicia, had been raped and sodomized.¹²⁸ Later the same day, her father was accused of the attack.¹²⁹ Even though Alicia insisted that her father was not the assailant,¹³⁰ she was placed in a foster home where she was told that she could not go home until she said that her father was her attacker.¹³¹ Kathleen Goodfriend, a department of social services investigator and family counselor, and her foster parents, the Gregorys, intensely pressured Alicia to accuse her father.¹³² After over a year of this pressure, Alicia yielded and accused her father.¹³³ Goodfriend and the Gregorys refused to follow court orders to allow visitation to her parents and as a result Alicia's mother did not see her for over a full year and her father did not see her for two years.¹³⁴

Following these horrific accusations, Alicia's mother attempted suicide and was confined to a locked psychiatric ward.¹³⁵ A month after this suicide attempt, Alicia's father was arrested and charged with the rape and sodomizing of Alicia.¹³⁶ DNA testing, conducted over a year and a half after Alicia's accusations, established that her father could not have committed the rape and all charges against the father were dropped.¹³⁷

The family subsequently filed suit against Goodfriend and the Gregorys alleging sixty-nine causes of action.¹³⁸ In finding for the family, the court stated that the "law recognize[d] that, where counselors abuse a therapeutic relationship with family members, causing injury to the children, emotional distress to the parent, and disrupting the parent-child relationship, they breach

¹²⁷*James W. v. Superior Court*, 21 Cal. Rptr. 2d 169 (Cal. Ct. App. 1993). For two and a half years, the therapist tried to convince the young girl that her father had sexually abused her. *Id.*

¹²⁸*Id.* at 170.

¹²⁹*Id.*

¹³⁰21 Cal. Rptr. at 171.

¹³¹*Id.*

¹³²*Id.*

¹³³*Id.* at 172.

¹³⁴21 Cal. Rptr. at 172.

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸21 Cal. Rptr. at 172. The court sustained demurrers without leave to amend to all but nine causes of action which included intentional infliction of emotional distress, conspiracy to intentionally inflict emotional distress, fraud and false imprisonment. *Id.*

their duties of care to the parent as well as the children."¹³⁹ According to the *James W.* court, the parent may sue the therapist because an implied duty to third parties arises when the therapist uses the parents as active instruments in the patient's treatment.¹⁴⁰

Other courts have extended a therapist's duty even further to include individuals with no involvement in the therapy relationship.¹⁴¹ In *Caryl S. v. Child & Adolescent Treatment Servs., Inc.*, the defendant-therapist had accused the plaintiff-grandmother, Caryl S., of sexually abusing her granddaughter.¹⁴² As a result of the allegations and upon recommendation by the therapist, the court limited the paternal grandparent's visitation rights.¹⁴³ The grandmother filed suit against the therapist for negligent professional misdiagnosis of child sexual abuse.¹⁴⁴ The court first analyzed whether the grandmother could maintain her action by examining whether the therapists owed a duty to the grandparents.¹⁴⁵ In its analysis, the court noted that sexual abuse of children had become "something of a national obsession."¹⁴⁶ It further noted that this "obsession" has resulted in the suffering of many innocent parents.¹⁴⁷ "It requires little imagination to see the harm [to the child and the grandparent] that might result from the negligently and erroneously formed conclusion . . . with subsequent treatment based on that misdiagnosis."¹⁴⁸ "A suspected abuser surely has the right to a reasonable expectation that such a determination, touching him or her so profoundly as it will, will be carefully made and will not be reached in a negligent manner."¹⁴⁹

The court concluded that a duty of care is owed by a therapist to an accused, regardless of the therapy relationship, when the therapist determines sexual abuse occurred and takes subsequent action aimed at shaping the conduct and well being of the child as well as the conduct of the accused.¹⁵⁰

¹³⁹*Id.* at 177.

¹⁴⁰*Id.*

¹⁴¹*Caryl S. v. Child & Adolescent Treatment Servs. Inc.*, 614 N.Y.S.2d 661 (1994).

¹⁴²*Id.* at 663.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵614 N.Y.S.2d at 664. The court noted that policy plays an important role in the decision of whether a duty is owed. *Id.* (citing *DeAngelis v. Lutheran Medical Ctr.*, 449 N.E.2d 406, 407 (N.Y. 1983)).

¹⁴⁶*Id.* at 665.

¹⁴⁷*Id.*

¹⁴⁸614 N.Y.S.2d at 666.

¹⁴⁹*Id.*

¹⁵⁰*Id.* at 667.

As Tarasoff, Ramona, James W., and Caryl S indicate, courts are willing to expand a therapist's duty in malpractice cases to include those parties foreseeably harmed by the therapist's actions based upon a misdiagnosis of sexual abuse. Such therapists have ignored important research that recovered memories may be false and unreliable and have instead encouraged their patients to file lawsuits against their alleged abusers. The injury to the family that results from the therapists negligent misdiagnosis is clear and foreseeable in the ending of the patient's contact with his or her family and the economic, reputational and emotional harm to the innocent family members. By expanding the therapist's duty to foreseeable third parties, the threat of civil liability for malpractice will not only deter premature allegations but will also act as a quality control device in the field of psychotherapy.

B. Infliction Of Emotional Distress

The torts of negligent and intentional infliction of emotional distress are another avenue through which a third party parent may seek to recover from a negligent therapist. As in a malpractice claim, the key question in a negligent or intentional infliction of emotional distress case is whether the health care provider owed a duty to the third party not to act in a negligent manner. The emotional distress suffered by parents in false memory cases due to the acts of their child's therapist raises the question of whether they can recover for this distress.

Early decisions in this field usually denied recovery under a negligence theory for nervous shock or emotional distress in the absence of physical impact to the plaintiff's own person.¹⁵¹ The Supreme Court of California analyzed the issues of duty and harm to a third party in a negligent infliction claim in *Molien v. Kaiser Foundation Hosps.*¹⁵² In *Molien*, a husband brought a claim of negligent infliction against a doctor who misdiagnosed his wife with syphilis.¹⁵³ The court applied the general principle of foreseeability as it had done in other cases of tort liability.¹⁵⁴ It concluded that the risk of harm to the husband was reasonably foreseeable to the doctors.¹⁵⁵ The court stated that it was easily predictable that an erroneous diagnosis of syphilis and the probable source of the infection would produce marital discord and result in emotional distress to a married patient's spouse.¹⁵⁶ "Because the disease is normally transmitted only by sexual relations, it is rational to anticipate that both husband and wife would experience anxiety, suspicion, and hostility when confronted with what they had every reason to believe was reliable medical

¹⁵¹ See *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896).

¹⁵² *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980).

¹⁵³ *Id.* at 814.

¹⁵⁴ See *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425 (1976).

¹⁵⁵ 616 P.2d at 817.

¹⁵⁶ *Id.*

evidence of a particularly noxious infidelity."¹⁵⁷ The court held that because the risk of harm to the husband was reasonably foreseeable, the doctor owed a duty to him to exercise due care in diagnosing the physical condition of his wife.¹⁵⁸

The court was still faced with the question of whether the husband was barred from recovery by the fact that he suffered no physical injury. The court looked to *Wallace v. Coca-Cola Bottling Plants, Inc.* which discarded the rule that recovery for mental suffering is dependent on bodily injury being alleged and proven.¹⁵⁹ "[W]e adopt the rule that in those cases where it is established by a fair preponderance of the evidence there is a proximate causal relationship between an act of negligence and reasonably foreseeable mental and emotional suffering by a reasonably foreseeable plaintiff, such proven damages are compensable even though there is no discernable trauma from external causes."¹⁶⁰ The court in *Molien* agreed with this and also held that the unqualified requirement of physical injury was no longer justifiable.¹⁶¹

One of the early decisions to recognize a therapists duty to a parent or other third party in a repressed memory case was the 1988 Colorado Court of Appeals decision in *Montoya v. Bebensee* where the court followed the *Tarasoff* precedent and held that a mental health care provider owed a duty to refrain from filing a public report or recommendation that would foreseeably result in the infliction of emotional distress upon another.¹⁶² Accordingly, the court refused to dismiss the plaintiffs' claims for negligent and intentional infliction of emotional distress.¹⁶³ In *Montoya*, the plaintiff father was accused of sexually abusing one of his daughters.¹⁶⁴ These allegations arose during the child's counseling sessions with the defendant therapist after the marriage between the father and the child's mother was terminated.¹⁶⁵ The therapist reported to county officials that the child claimed that her father had sexually abused her and also advised plaintiff's ex-wife to restrict father's visitation rights.¹⁶⁶ The father along with the two children brought suit against the therapist alleging that the therapist's actions "were negligent, were undertaken willfully, wantonly, and in reckless disregard of Plaintiffs' rights and feelings, and constituted outrageous conduct that intentionally or negligently inflicted

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Wallace v. Coca-Cola Bottling Plants, Inc.*, 269 A.2d 117 (Me. 1970).

¹⁶⁰*Id.* at 121.

¹⁶¹*Molien*, 616 P.2d at 820.

¹⁶²*Montoya*, 761 P.2d at 288.

¹⁶³*Id.* at 290.

¹⁶⁴*Id.* at 286.

¹⁶⁵*Id.*

¹⁶⁶761 P.2d at 286.

emotional distress upon them."¹⁶⁷ Like *Bird*, the court considered several factors and looked to a balancing test in making its decision. The court considered:

[T]he risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor.¹⁶⁸

The court weighed the great social utility of requiring therapists to make reports of suspected child abuse and the "significant risk of substantial injury" that may occur to one falsely accused of child abuse.¹⁶⁹ The extension of the duty owed by a therapist "to any person, who is the subject of any public report or other adverse recommendation by that provider," placed no greater burden upon the therapist than that placed on any other similarly situated professional.¹⁷⁰ The court concluded that "the harm that may result from negligent false accusations is readily foreseeable."¹⁷¹

The tort of intentional infliction of emotional distress is defined as the intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional or mental distress, even in the absence of physical harm.¹⁷² The Second Restatement of Torts does not require that the emotional distress be accompanied by any kind of bodily harm.¹⁷³ However, it notes that courts may tend to look for bodily harm as a guaranty that the emotional distress is real. But, if the outrageousness of the act is clear enough, liability will be found without bodily harm.¹⁷⁴

Under this tort, the duty owed by a health provider is not to intentionally inflict emotional distress upon the third party.¹⁷⁵ "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm results from it, for such bodily harm."¹⁷⁶ Liability for this tort may be founded

¹⁶⁷*Id.*

¹⁶⁸*Id.* at 288. (quoting *Smith v. Denver*, 726 P.2d 1125 (Colo. 1986)).

¹⁶⁹*Id.*

¹⁷⁰761 P.2d at 289. Statutory immunity is generally granted to therapists who report suspected cases of child sexual abuse. The court found that the therapist owed a duty "to use due care in formulating any opinion upon which a report of recommendation is to be placed. *Id.* But in this case, the court found that the statute did not cover the therapist's conduct because her conduct was outrageous and not in good faith. *Id.* at 289-90.

¹⁷¹*Id.* at 288-89.

¹⁷²RESTATEMENT (SECOND) OF TORTS § 46 (1986).

¹⁷³*Id.* at Comment k.

¹⁷⁴*Id.*

¹⁷⁵*Tuman v. Genesis Assocs.*, 894 F. Supp. 183, 190 (E.D. Pa. 1995).

not only on subjective intent or substantial certainty of the result, but also on reckless disregard of the probable consequences of the defendant's behavior.

In false memory cases, a high probability exists that the third party would be mentally harmed by the therapist's conscious and deliberate disregard for the consequences of his or her diagnosis or treatment. The therapist's conduct would therefore properly be called willful, wanton or reckless.¹⁷⁷

In *Tuman v. Genesis Assocs.*, the United States District Court for the Eastern District of Pennsylvania refused to dismiss a parent's intentional infliction of emotional distress claim against a psychotherapist for creating his daughter's false memories and false allegations.¹⁷⁸ The court referred to the Pennsylvania Superior Court case of *Bartanus v. Lis* for its decision.¹⁷⁹ In *Bartanus*, the court held that allegations that the therapist persuaded the plaintiff's son to stay away from plaintiff by repeatedly telling the son that plaintiff was unloving, a whoremaster, liar, and con artist, and that plaintiff's house was dirty, poisonous, and rat-infested, sufficiently stated a claim for intentional infliction of emotional distress.¹⁸⁰ The court concluded that the therapists had independent duties to the parents not to intentionally inflict emotional distress on them.¹⁸¹ Accordingly, the *Tuman* court concluded that the therapists owed independent duties to the parent not to intentionally inflict emotional distress.¹⁸²

In *Montoya v. Bebenese*, the Colorado Court of Appeals refused to dismiss the family's claim for intentional infliction of emotional distress.¹⁸³ In *Montoya*, the father claimed that the actions of the therapist were willful and wanton and in reckless disregard of his rights and feelings.¹⁸⁴ The court reasoned that the actions of the therapist were not undertaken in good faith and concluded that a mental health provider's diagnosis, treatment, and rendering of an expert opinion can give rise to an outrageous conduct claim.¹⁸⁵

Furthermore, in *James W. v. Superior Court*, the California court affirmed the overruling of demurrers by the trial court to the plaintiffs' claims of intentional

¹⁷⁶RESTATEMENT, *supra* note 172.

¹⁷⁷KEETON, *supra* note 98, at 65.

¹⁷⁸*Tuman*, 894 F. Supp. at 190.

¹⁷⁹*Id.* (citing *Bartanus v. Lis*, 480 A.2d 1178 (Pa. Super. Ct. 1984)).

¹⁸⁰*Id.*

¹⁸¹*Id.*

¹⁸²*Tuman*, 894 F. Supp. at 190.

¹⁸³761 P.2d at 290.

¹⁸⁴*Id.* at 289.

¹⁸⁵*Id.* at 289-90.

infliction.¹⁸⁶ The court concluded that "where counselors abuse a therapeutic relationship with family members, causing injury to the children, emotional distress to the parent, and disrupting the parent-child relationship, they breach their duties of care to the parent as well as the children."¹⁸⁷

In another recent case involving a claim of intentional infliction resulting from the implantation of false memories, the United States District Court for the Northern District of Illinois in *Lindgren v. Moore* refused to dismiss the parent's intentional infliction claim.¹⁸⁸ In *Lindgren*, Amy Lindgren sought treatment from the therapist for depression and bulimia.¹⁸⁹ The therapist was not licensed in Illinois as a clinical psychologist.¹⁹⁰ The therapist prescribed a program for the daughter which included reading "The Courage to Heal."¹⁹¹ As a result of these treatments, the daughter began having flashbacks of her father sexually abusing her.¹⁹² The plaintiffs, Amy's father, sister and brother brought suit alleging that the therapist, in the course of her therapy, falsely convinced Amy that she was abused by her father. They further alleged that the "therapist knew, or had reason to know that such a course of treatment would ultimately lead to destruction of the family unit and permanent estrangement of the daughter from the rest of her relations."¹⁹³ Also, that the therapist intentionally caused the plaintiffs to suffer humiliation, mental anguish, and emotional distress.¹⁹⁴

The *Lindgren* court set forth the requisite elements to plead a claim for emotional distress: (1) the conduct in question was extreme and outrageous; (2) the actor intended or knew that there was a high degree of probability that the conduct would inflict severe emotional distress; and (3) the conduct caused such distress.¹⁹⁵ In maintaining plaintiffs' claim, the court reasoned that the conduct "must go beyond all possible bounds of decency to be considered extreme and outrageous."¹⁹⁶ The court concluded that it was not in a position to conclude, as a matter of law, that a therapist who falsely convinces a patient that she was sexually abused by her father has not engaged in conduct that is

¹⁸⁶*James W.*, 21 Cal. Rptr.2d at 178.

¹⁸⁷*Id.* at 177.

¹⁸⁸*Lindgren v. Moore*, 907 F. Supp. 1183, 1190 (N.D. Ill. 1995).

¹⁸⁹*Id.* at 1186.

¹⁹⁰*Id.*

¹⁹¹*Id.*

¹⁹²907 F. Supp. at 1186.

¹⁹³*Id.*

¹⁹⁴*Id.*

¹⁹⁵907 F. Supp. at 1189.

¹⁹⁶*Id.*; see *Schroeder v. Lufthansa German Airlines*, 875 F.2d 613, 623 (7th Cir. 1989).

extreme and outrageous and that this should be determined on a case-by-case basis.¹⁹⁷

As the decisions in *Molien*, *Tuman*, *Montoya*, *James W.*, and *Lindgren* establish, courts are beginning to recognize an independent duty owed by a psychotherapist to the parents, or other involved third parties, not to negligently or intentionally inflict emotional distress upon them. Because of the ridicule and irreparable harm that is an easily foreseeable result of a misdiagnosis of past child sexual abuse, the therapist should be held to a standard of duty owed to all those who may be directly affected by the treatment and should be subject to liability for the emotional harm caused by such misdiagnosis.

C. Defamation

The liability of negligent therapists also arises for the damage to the reputation in the community of falsely accused parents resulting from false memories. A person's interest in his reputation is protected by the tort actions of libel and slander, collectively called defamation.¹⁹⁸ "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹⁹⁹ Defamation has also been defined as a statement which tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided.²⁰⁰ Defamation is an invasion of the interest in reputation and good name.²⁰¹

In *Tuman*, the court refused to dismiss the parents' defamation claim against the therapists. The court in *Tuman* set forth the requisite elements for a defamation claim. To state of claim for defamation, a plaintiff must allege (1) a defamatory communication; (2) pertaining to the plaintiff; (3) published by the defendant to a third party; (4) who understood that the communication pertained to the plaintiff and had a defamatory meaning; and (5) that resulted in plaintiff's injury.²⁰²

¹⁹⁷*Id.* at 1189-90.

¹⁹⁸KEETON, *supra* note 98, at 771. Libel occurs when the defamatory statement is made in writing, while slander occurs when the defamatory statement is made orally. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

¹⁹⁹RESTATEMENT (SECOND) OF TORTS § 559 (1977).

²⁰⁰"[W]ords which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of rightthinking persons, an to deprive one of their confidence and friendly intercourse in society." *Kimmerle v. New York Evening Journal*, 186 N.E. 217, 218 (N.Y. 1933).

²⁰¹KEETON, *supra* note 98, at 771.

²⁰²*Tuman*, 894 F. Supp. at 190; *see* *Petula v. Melody*, 588 A.2d 103 (Pa. Commw. Ct. 1991).

In *Tuman*, the parents alleged that, during group therapy sessions, the therapists made slanderous statements about plaintiffs by stating that their daughter was the victim of incest and ritual satanic abuse.²⁰³ The parents further alleged that the therapists implanted false memories of severe childhood abuse in their daughter and in this way induced and encouraged their daughter to publish defamatory statements about her parents.²⁰⁴ The court stated that a person "is liable for publication of defamation by a third person whom as his servant, agent, or otherwise he directs or procures to publish defamatory matter."²⁰⁵

Other courts may now follow *Tuman* by allowing third party claims for defamation against negligent therapists for the damage done to their reputations in the community. It is not difficult to imagine and foresee the degree of ridicule and hatred falsely accused parents would endure in the community after the publication of sexual abuse allegations against them. Here again, the expansion of a therapist's duty establishes liability for the false accusations of child sexual abuse published to the community. By holding the therapist liable for the resulting injury from false publications, additional research and experimentation will probably be taken to ensure the accuracy of such dangerous accusations before they are published to the patient or the community.

D. Loss of Companionship and Society

The loss of the affection and companionship of a child is another avenue from which a parent may seek to recover from a negligent therapist. The law of torts is concerned not only with the protection of interests of personality and of property, but also with what may be called "relational" interests founded upon the relationships the plaintiff has with third parties.²⁰⁶ "An interference with the continuance of the relation, unimpaired, may be redressed by a tort action; and of this the relations of a family are a conspicuous example."²⁰⁷ A conflict exists between the jurisdictions as to whether to recognize a parent's cause of action for loss of filial consortium caused by the interference of a third party.

In a false memory case, the implanting of these memories puts the child in a difficult position of facing the accused parents. As an important part of the therapy, the therapist will often require the child to confront the alleged abusers as part of the healing process.²⁰⁸ As a result, the parent-child relationship is

²⁰³*Id.*

²⁰⁴*Id.*

²⁰⁵RESTATEMENT (SECOND) OF TORTS § 577 cmt. f (1977).

²⁰⁶KEETON, *supra* note 98, at 915.

²⁰⁷*Id.* (citing Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916)).

²⁰⁸*See Ramona*, No. 61898 (Cal. Super. Ct. May 13, 1994).

destroyed. The falsely accused parents are left to live a life estranged from their child.

Pennsylvania courts have consistently refused to recognize a parent's cause of action for loss of filial consortium caused by the interference of a third party.²⁰⁹ However, Massachusetts, Michigan, Iowa, Illinois and Wisconsin have established a position permitting parents to sue based on loss of consortium of their children.²¹⁰

Illinois courts have construed the law to include loss of society and companionship of a child.²¹¹ In *Sullivan v. Cheshier*, the United States District Court for the Northern District of Illinois, construing Illinois law, refused to dismiss the parent's claim that the therapists intentionally interfered with the parent-child relationship.²¹² In *Sullivan*, Kathleen Sullivan and her parents met with Dr. William Cheshier who informed the parents that through hypnosis treatment, he believed that Kathleen had been sexually abused as a child by one of her older siblings.²¹³ Dr. Cheshier told them that Kathleen could not be questioned regarding these repressed memories.²¹⁴ Prior to the hypnosis, Kathleen had never made statements regarding sexual abuse.²¹⁵ Kathleen also stated that she would decline all family contact unless family members admitted that the allegations were true.²¹⁶

The parents alleged that Dr. Cheshier specifically directed his actions against the parents, that he implanted a false memory in their daughter, instructed her to break contact with her parents if they disagreed with her memory, and prevented the parents from questioning the validity of these memories.²¹⁷ The court relied on *Dymek v. Nyquist*, which allowed a father to sue his ex-wife and a psychiatrist for destroying a father-son relationship.²¹⁸ It also looked to *Kunz v. Deitch* which allowed a father to sue grandparents for trying to separate him

²⁰⁹*Tuman*, 894 F. Supp. at 189-90; see *Jackson v. Tastykake, Inc.*, 648 A.2d 1214 (Pa. Super. Ct. 1994); *McCaskill v. Philadelphia Hous. Auth.*, 615 A.2d 382 (Pa. Super. Ct. 1992); *Steiner v. Bell Tel. Co.*, 517 A.2d 1348 (Pa. Super. Ct. 1986).

²¹⁰See *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980); *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); and *Theama v. City of Kenosha*, 344 N.W.2d 513 (Wis. 1984).

²¹¹*Batteast v. Wyeth Labs., Inc.*, 526 N.E.2d 428 (Ill. App. Ct. 1988), *rev'd on other grounds*, 560 N.E.2d 315 (Ill. 1990).

²¹²*Sullivan v. Cheshier*, 846 F. Supp. 654 (N.D. Ill. 1994).

²¹³*Id.* at 657.

²¹⁴*Id.* at 661.

²¹⁵*Id.*

²¹⁶846 F. Supp. at 661.

²¹⁷*Id.* at 660.

²¹⁸*Dymek v. Nyquist*, 469 N.E.2d 659 (Ill. App. Ct. 1984).

from his son.²¹⁹ The *Sullivan* court concluded that "[f]rom these facts, a jury could infer that the memories were false and intentionally or recklessly implanted by Dr. Cheshier."²²⁰

The court concluded that the parents could maintain their claim for loss of consortium because there was no question that after the allegations were made by the daughter her relations with her parents and siblings significantly deteriorated.²²¹ "It would be hard to doubt that the family relationship would be seriously and negatively affected by such a situation."²²²

In *Lindgren v. Moore*, another Illinois decision, the district court followed *Sullivan* by denying a motion to dismiss the family's claim for loss of consortium.²²³ The court looked to *Sullivan* and the Illinois Supreme Court case of *Dralle v. Ruder* for guidance in its decision.²²⁴

The court in *Dralle* dismissed a mother's claim against physicians for loss of society resulting from negligent care that her child received before and at the time of his birth.²²⁵ The court held that this indirect interference with the family relationship was not sufficient to state a claim for loss of society.²²⁶ The court noted that "[w]e do not consider at this time the nature or extent of the recovery in cases based on what has been termed a 'direct interference' with the parent-child relationship, as opposed to the indirect interference involved here."²²⁷ "Direct interference" occurs when the defendant's actions directly affect the parent-child relationship, not a mere derivative consequence or effect.²²⁸ Accordingly, the *Lindgren* court recognized a claim for loss of society from direct interference with the parent-child relationship.²²⁹

As Illinois, Michigan, Massachusetts, Iowa, and Wisconsin have established, loss of society and companionship is a viable claim against negligent therapists. The fragile foundation of trust that is the cornerstone of the parent-child

²¹⁹Kunz v. Deitch, 660 F. Supp. 679 (N.D. Ill. 1987).

²²⁰*Sullivan*, 846 F. Supp. at 662.

²²¹*Id.*

²²²*Id.*

²²³*Lindgren*, 907 F. Supp. at 1191.

²²⁴*Dralle v. Ruder*, 529 N.E.2d 209 (Ill. 1988).

²²⁵*Id.*

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Person v. Behnke*, 611 N.E.2d 1350, 1354 (Ill. App. 1993).

²²⁹*Lindgren*, 907 F. Supp. at 1190. The court in *Lindgren* found that *Dralle* implicitly recognized a cause of action for the direct interference with filial relationships and recovery for the loss of society resulting from that interference. *Id.* at 1190-1191. The court concluded that the cases of *Sullivan* and *Person*, both permitting direct interference claims as consistent with *Dralle*, reinforced its interpretation of *Dralle* and its decision to recognize loss of society from direct interference. *Id.* at 1190.

relationship can be forever harmed by the therapist's interference and implantation of false memories of sexual abuse committed by the parents. This alleged breach of trust, even though subsequently found false, leaves a lingering memory caused by the overzealous therapist. That therapist should be held accountable for the harm caused by his or her improper conduct.

E. Breach of Contract

Unlike tort actions, a parent's action for breach of contract relies on the specific terms of the agreement between the parents and the therapist. As recognized by the seminal decision in *Tuman*, parents who pay for treatment rendered to their children can bring a breach of contract action against the therapist who accepts the obligation to provide adequate care if such therapist fails to provide such care. To state a breach of contract claim, the plaintiff must allege that he or she "specifically instructed the defendant [therapist] to perform a task that the defendant failed to perform, or . . . [that] the defendant made a specific promise upon which the plaintiff reasonably relied to [her] detriment."²³⁰

In the tort causes of action previously mentioned, as opposed to contract causes, the therapists' duty of care arises from the professional relationship itself.²³¹ In a contract case, however, the duty is established by the parties' contract. To state a contract claim, the parent must allege that the therapist breached more than the non-contractually created duty of care.²³²

In the landmark case of *Tuman*, the district court ruled for the first time that parents who pay for a child's psychiatric treatment may pursue a breach of contract claim against mental health therapists who agree to provide adequate treatment to the child and who allegedly implant false memories of abuse in the patient-child. In *Tuman*, the parents specifically instructed the therapists to treat their daughter, Diane, for bulimia and other emotional problems.²³³ The therapists agreed to treat Diane using therapy that required the parents to stop further contact with her for two years.²³⁴ The parents alleged that they formed a contract with the therapists, by which the therapists agreed to provide their daughter with adequate mental health counseling and, in return, the parents agreed to detach from the child and pay for the therapy.²³⁵ The parents' further alleged that the therapists breached the contractually based promise by provid-

²³⁰Resolution Trust Corp. v. Farmer, 823 F. Supp. 302, 308 (E.D. Pa. 1993).

²³¹See *Ramona v. Isabella*, No. 61898 (Cal. Super. Ct. May 113, 1994); *Caryl S. v. Child & Adolescent Treatment Servs.*, 614 N.Y.S.2d (1994).

²³²*Tuman*, 894 F. Supp. at 186 (E.D. Pa. 1995).

²³³*Id.* at 186.

²³⁴*Id.*

²³⁵*Id.*

ing their daughter with substandard care.²³⁶ The court reasoned that since the parents specifically instructed defendants to treat Diane for bulimia and that the defendants agreed to provide this treatment, a trier of fact could find the existence of a contract.²³⁷ The court concluded that the parents stated a cause of action and refused to dismiss the contract claim against the therapists.²³⁸

The holding in *Tuman* may be the first step for future claims by parents against therapists under contract law. The court found that the acceptance by a therapist of the obligation to provide adequate care to a patient and his or her subsequent breach of that agreement, created a claim for damages caused as a result of the breach. As *Tarasoff* found third party claims under a negligence cause of action, *Tuman* now establishes a strong precedent for contract causes of action for parents against the therapists.

IV. CONCLUSION

After *Ramona* opened the door for third party actions against psychotherapists, the future of recovery for wrongly accused parents looks promising. New cases, such as *Tuman*, are continually breaking new ground by allowing new causes of action against negligent therapists. The filial, emotional, social, economic and physical damage that is an easily foreseeable result of false accusations of sexual child abuse warrants that therapists be held accountable for their actions and accusations. A sexual abuser of children is one of the worst labels in society today. It is easy to imagine the difficulty of one wrongly accused of sexual abuse to escape the incredible social stigma that accompanies this "scarlet letter."²³⁹ It is also easy to imagine the permanent losses that would result from this label. If negligent therapists are allowed to continue to use unreliable suggestive techniques and to urge their patients to seek legal action against their parents without some threat of liability, society may begin to doubt the true claims from abused children. As *Ramona* and *Tuman* are beginning to establish, those wrongly accused as a result of the use of false memories are no longer destined to a lifetime of ridicule and ostracism. They may be given their day in court and may be compensated for their monumental losses.

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²³⁶894 F. Supp. at 185.

²³⁷*Id.* at 187.

²³⁸*Id.*

²³⁹NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Boston, Houghton Mifflin 1960). This classic tale of adultery portrays a woman who was forced to wear a scarlet-colored letter "A" on her chest for the rest of her life. The letter was used as notice to all of her crime resulting in ridicule and torment. *Id.*

